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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

NO. 72-1040

COMMUNIST PARTY OF INDIANA, Gus Hall, Jarvis Tyner, Simon Boorda, Jesse Reece, Mike Bayer, and Ruth Norrick, Individually and on behalf of all other qualified voters similarly situated,

Appellants,

-v.-

EDGAR D. WHITCOMB, Individually and as Governor of the State of Indiana; Karl J. Stipher and Thurman DeMoss, Individually and as members of the Indiana State Election Board; and INDIANA STATE ELECTION BOARD,

Appellees.

On appeal from the United States District Court for the Northern District of Indiana, Hammond Division

MOTION TO DISMISS OR AFFIRM

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MOTION TO DISMISS OR AFFIRM

Appellees (hereafter referred to as Election Board) respectfully move the Court to dismiss this appeal upon the ground that the Notice of Appeal was not timely filed or, in the alternative, to affirm the decision of the United States District Court for the Northern District of Indiana.

QUESTIONS PRESENTED

1. Whether the notice of appeal in this case was timely filed.

2. Whether the challenge to the constitutionality of the "loyalty oath" provisions of Indiana election law presents a question which is so substantial as to require further argument.

STATEMENT OF THE CASE

The Election Board does not accept the Statement of the Case set out in the Jurisdictional Statement.

Indiana law requires that a group seeking a place on the ballot as a political party must file with the Election Board petitions bearing signatures of a prescribed number of registered voters along with a prescribed affidavit. The affidavit, signed by the officers of the party, must state that the party

> "does not advocate the overthrow of local, state or national government by force or violence, and that it is not affiliated with and does not cooperate with nor has any relation with any foreign government, or any political party, organization or group of individuals of any foreign government." Indiana Code of 1971 (I.C. 1971), 3-1-11-12.

Appellants (hereafter referred to as the Communists) tendered petitions but failed to tender the required affidavit. The Election Board therefore refused to accept the petitions. The Communists then filed suit, alleging the unconstitutionality of the affidavit requirement, in the United States District Court for the Northern District of Indiana, Hammond Division. The Complaint was filed on August 30, 1972, and an amended complaint was filed on September 8, 1972.

A three-judge court was convened pursuant to 28 U.S.C. §§ 2281 and 2284. A hearing was held on September 28,

1972, at which this case was consolidated for hearing and decision with the suits of two other groups which had been denied a place on the ballot for noncompliance with the affidavit requirement. These groups are the Indiana Peace and Freedom Party and the Indiana American Independent Party, Inc.

The District Court's Memorandum and Order was handed down that same day. The affidavit requirement was held to be severable. The first portion, providing "that it does not advocate the overthrow of local, state or national government by force or violence," was held constitutional, while the remainder was held unconstitutional.[1] The Election Board was ordered to accept from the Communists an affidavit meeting the requirements of the part of the statute held constitutional at any time prior to 2:00 P.M. on September 29, 1972. (Jur. Stat. pp. 2a-4a).

An affidavit was filed, but it was rejected as not in proper form because it attached a limiting definition on the term "advocate." (Jur. Stat. p. 8a). The Communists then filed with the District Court a Petition for Mandate to Enforce the Prior Order of the Court. That petition was denied on October 4, 1972, the District Court holding that the "Election Board acted in accordance with the precise wording of this court's order." (Jur. Stat. p. 5a).

On October 10, 1972, the Communists filed both a Notice of Appeal and a Motion to Amend. On October 17, 1972, they filed a Motion to Withdraw Notice of Appeal. On October 31, 1972, the District Court granted the Motion to Withdraw and denied the Motion to Amend. (Jur. Stat. p. 6a). The Communists then filed a second Notice of Appeal on November 29, 1972.[2] (Jur. Stat. p. 7a).

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[1] The Election Board's appeal from the determination of partial unconstitutionality has been docketed in this Court as Number 72-990.

[2] The Election Board's Notices of Appeal were filed on November 16, 1972. (Jur. Stat., Cause No. 72-990, pp. 5a-7a).

ARGUMENT

I

THE NOTICE OF APPEAL WAS NOT TIMELY FILED

For this appeal to be timely filed, a Notice of Appeal must have been filed within sixty days of the entry of the District Court's Memorandum and Order of September 28, 1972. Rules of the Supreme Court, Rule 11(3), 28 U.S.C. § 2101 (b). That sixty day period would expire on November 27, 1972. The Notice of Appeal was filed on November 29, 1972. (Jur. Stat. p. 7a). Thus the Notice was not timely filed unless for some reason the running of the sixty day period was tolled.

On October 10, 1972, the Communists filed a timely Motion to Amend pursuant to Fed. R. Civ. Pro., Rules 52(b) and 59(e). Such a motion has been held to destroy the finality of the District Court order so as to extend the time for appeal. *Leishman v. Associated Wholesale Electric Company*, 318 U.S. 203 (1943). See *Moore's Federal Practice* §§ 52.11(3) and 59.12(2). The Notice of Appeal was filed within sixty days of the denial of the Motion to Amend.

The complicating factor, though, is that a Notice of Appeal was filed by the Communists on October 10, 1972, the same date as the filing of the Motion to Amend. It is further clear that the filing of a Notice of Appeal divests the District Court of jurisdiction and vests that jurisdiction in the appellate tribunal. *Moore*, § 52.11(1) at pp. 2752-2754. *Fiske v. Wallace*, 115 F.2d 1003 (8 Cir. 1940), cert. den. 314 U.S. 663 (1941).

Some exceptions appear to have been allowed to this rule, but those would not affect this case. For example, one case has held that the filing of a Notice of Appeal by one party would not prevent the filing of a Motion to Amend by the other party. *Elgen Manufacturing Corporation v.*

Ventfabrics, Inc., 314 F.2d 440 (7 Cir. 1963). Some courts have also allowed correction of clerical mistakes under Fed. R. Civ. Pro., Rule 60(a), after the filing of the Notice of Appeal but before docketing. *Kelley v. Bank Building & Equipment Corp.*, 453 F.2d 774 (10 Cir. 1972). None of the exceptions, however, would include the simultaneous filing by the same party of a Notice of Appeal and a Motion to Amend which seeks a substantive change in the findings.

It is therefore necessary to decide the effect of the simultaneous filing of inconsistent motions. It has been stated as a general rule that a motion is abandoned or waived by the filing of an inconsistent motion. 60 C.J.S., "Motions and Orders", § 42. If that rationale is carried over to the filing of simultaneous motions, it might be that neither was effective.

Another question is whether the later withdrawal of the first Notice of Appeal had the effect of giving the Motion to Amend any greater force or effectiveness than it had had before. There appears to be neither authority nor logic for any fiction that jurisdiction can be retroactively vested or divested. Indeed, there could even be a question, if the Notice of Appeal divested the District Court of jurisdiction, whether that court could even rule on the withdrawal.

It is not contended here that the law is clear on this subject; rather, there seems to be silence, doubt and uncertainty. The Election Board submits, however, that the Motion to Amend, filed simultaneously with a Notice of Appeal, was not effective to stay the sixty day period set out in 28 U.S.C. § 2101.

II

THE INDIANA AFFIDAVIT REQUIREMENT IS CONSTITUTIONAL

The language of the affidavit which is required by Indiana law is that the political party, as an entity, "does not advo-

cate the overthrow of local, state or national government by force or violence." Before going to the merits of the allegation of unconstitutionality, certain minor points must be clarified.

Reference is made in the Jurisdictional Statement to Official Opinion No. 11 of the Attorney General of Indiana. The Election Board believes that opinion to contain an accurate statement of the law. The Jurisdictional Statement, however, refers to it as though the opinion itself were the law. Under Indiana law, an Attorney-General Opinion does not have the force of law. I.C. 1971, 4-6-2-5, as found in Ind. Ann. Stat. (Burns 1964 Repl.) § 49-1908; *State ex rel. Lynch Coal Operators Reciprocal Association v. McMahan*, 194 Ind. 151 (1924).

The Jurisdictional Statement (at p. 13) also attempts to transmute this question of civil law into one of criminal law by reference to the mention in Official Opinion No. 11 of the possibility of perjury. (Indiana law requires the Election Board to investigate the veracity of the affidavit to the extent it shall find necessary. I.C. 1971, 3-1-11-12, supra, set out at Jur. Stat. p. 4). Under Indiana law, the Attorney General does not have general criminal jurisdiction or the power to institute criminal proceedings. That power is vested by law in the local prosecuting attorney. I.C. 1971, 35-1-15-21, 35-1-16-1 and 35-1-16-10, as found in Ind. Ann. Stat. (Burns 1956 Repl.) §§ 9-824, 9-901 and 9-909. The sole issue in this case is that of the statute requiring the affidavit.

The Communists attempted to file an affidavit which limited the scope of the statutory language by reference to the case of *Yates v. United States*, 354 U.S. 298 (1957). The refusal of that particular limitation is then assumed to be an adoption of the broadest possible scope of the statutory language. That assumption does not follow, however, since the particular standard of limitation suggested has been held inapplicable to cases like the matter at bar.

Yates was a criminal case in which the issue was the sufficiency of the instructions to the jury. *Yates* was held inapplicable to a merely regulatory statute in *Communist Party v. Control Board*, 367 U.S. 1 at 56 (1961). Refusal of an inappropriate standard is certainly not erroneous. The case of *State ex rel. Socialist Labor Party v. State Election Board*, 251 Ind. 260 (1968), cited in the Jurisdictional Statement at p. 14, does not deal with the scope of the statutory language in question, but does hold that strict compliance with the statutory requirement is necessary.

This Court has recently given consideration to the constitutionality of such "loyalty oaths." *Cole v. Richardson*, 405 U.S. 676 (1972). The oath under consideration there had two parts. The first was a requirement to uphold and defend the Constitution. That requirement was upheld as clearly analogous to oaths required by the Constitution itself.

The second part was a requirement to "oppose the overthrow of the government of the United States or of this Commonwealth by force, violence, or by any illegal or unconstitutional method." That clause was also upheld for the reason that it was merely the converse of the first and did not expand the obligation of the oath. It was pointed out that the oath did not require any affirmative action, but dealt with a state of mind. A part of the requirement to uphold and defend the Constitution is the requirement of opposing its overthrow by force or violence.

The issue which is then presented by this case is whether one may advocate, if only as a matter of abstract doctrine, that which he has the constitutional duty to oppose! It may be that, by means of some "verbal calesthenics" such a result may be reached, but this Court in *Cole v. Richardson* rejected such antics.

As a further reason for affirmance, it is noted that the case falls squarely within the scope of the Communist Control Act of 1954, which provides that:

> "The Communist Part of the United States, or any successors of such party regardless of the assumed name, whose object or purpose is to overthrow the Government of the United States, or the government of any State . . . therein by force and violence, are not entitled to any of the rights, privileges, and immunities attendant upon legal bodies created under the jurisdiction of the laws of the United States or any political subdivision thereof . . ." 50 U.S.C. § 842.

That the Communist Party of Indiana is a part of the Communist Party of the United States is clearly established, since the Communists themselves so alleged in their Complaint. It is clear that the judgment of the District Court in this cause was proper.

CONCLUSION

For the foregoing reasons, this Court should dismiss this appeal for failure to file a timely notice of appeal or, in the alternative, affirm the decision of the United States District Court for the Northern District of Indiana.

Respectfully submitted,

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